

October 15, 2004

To: District Health Directors
District Environmental Health Managers
Office of Environmental Health Services
Authorized Onsite Soil Evaluators (AOSEs)

From: Robert B. Stroube, State Health Commissioner

Subject: Implementation of House Bill 930

Guidance Memoranda and Policies (GMP) # 128

I. Background.

The 2004 General Assembly passed House Bill 930 (Acts of Assembly, Chapter 916, 2004) which amends § 32.1-164.1:1 of the *Code of Virginia* by adding the following subsection:

- B. Further, whenever any onsite sewage system is failing and the Board's regulations for repairing such failing system impose (i) a requirement for treatment beyond the level of treatment provided by the existing onsite sewage system when operating properly or (ii) a new requirement for pressure dosing, the owner may request a waiver from such requirements. The Commissioner shall grant any request for such waiver, unless he finds that the failing system was installed illegally without a permit. Any such waivers shall be recorded in the land records of the clerk of the circuit court in the jurisdiction in which the property on which the relevant onsite sewage system is located. Except between a husband and a wife, waivers granted hereunder shall not be transferable and shall be null and void upon transfer or sale of the property on which the onsite sewage system is located. Additional treatment or pressure dosing requirements shall be imposed in such instances when the property is transferred or sold.*

The owner of the relevant property shall disclose, in writing, to any and all potential purchasers or mortgage holders that any operating permit for the onsite sewage system that has been granted a waiver authorized by this subsection shall be null and void at the time of transfer or sale of the property and that the Board's regulatory requirements for additional treatment or pressure dosing shall be required before an operating permit may be reinstated.

This guidance document replaces GMP #124 and outlines procedures for processing applications for repair permits (construction permits) pursuant to § 32.1-164.1:1.B and 12 VAC 5-610-280.C.2. The policy also contains suggested letters, a flow chart, and an Agreement to be executed by any owner who requests the Waiver. **GMP #124 is hereby rescinded.**

II. General.

Section 32.1-164.1:1.B of the *Code* offers financial relief (a waiver) to the current owner of a property whose system is failing and who is facing a new requirement(s) for secondary treatment, pressure dosing (PD), or both. In practical terms, this means that a system originally permitted (in either primary or reserve areas) to disperse secondary or better effluent (SE) must be repaired using similar treatment. The owner of such a system would not be eligible for a waiver from the *treatment* requirements of the *Sewage Handling and Disposal Regulations* (12 VAC 5-610-20 et seq., as amended July 1, 2000, the *Regulations*). That owner, however, would be eligible for a waiver from pressure dosing as long as his original permit did not require pressure dosing in either the primary or reserve areas. The same reasoning also applies to a system originally permitted for pressure dosing in either the primary or reserve areas- the owner of such a system is not eligible for a waiver from pressure dosing. An owner with a system originally permitted for both PD and SE in either the primary or reserve areas is not eligible for a waiver.

A qualified owner may request a waiver and the waiver must be granted unless the Commissioner finds “that the failing system was installed illegally without a permit.” The waiver is transferable only between a husband and a wife. Any other transfer of the property voids the waiver and the current operating permit for the system, even if that system is not failing at the time of the transfer. To obtain a new operating permit, the new owner must comply with the *Regulations* that were waived as well as any subsequent requirements that may have been imposed since the waiver was granted. Any owner who receives a waiver must record the Waiver in the land records of the circuit court and disclose the waiver in writing to any potential purchaser or mortgage holder.

Section 280.C.2 of the *Regulations* provides that the district health director or environmental health manager may, in cases of economic hardship, waive the requirement for secondary treatment for repairs. Effective immediately, this policy shall be used to implement § 280.C.2 of the *Regulations*.

III. System Designs.

To ensure the financial relief intended by the law, Virginia Department of Health (VDH) personnel will continue to design gravity-flow or simple pump STE systems if requested by the owner.¹ VDH employees are advised that they should refrain from designing systems with SE and/or PD. Such system designs require either the practice of engineering or

¹ GMP #125 contains general guidance for VDH employees and others regarding exemptions from the Practice of Engineering.

the need to name specific product brands. VDH regulates the onsite sewage industry and issues approvals for manufacturers and proprietary products. Hence, it is inappropriate for VDH to design onsite systems with PD or SE because that would give the appearance of VDH endorsing one product over another one. Further, extensive consulting is required between the designer and the owner to assure that the owner's needs are met and appropriate products are chosen and used. Such individual and extensive consulting is not supported by the fees currently established for onsite sewage system applications and VDH does not have sufficient resources to support such activities.

Section 32.1-164.1:1.B of the *Code* requires that any system with a waiver must be upgraded with the current regulations upon transfer of the property (transfers between husbands and wives are exempted). This means that the SE and/or PD requirements that were waived for the current owner will be added for the new owner. Therefore, it is in the owner's best interest to consider the current and future costs of complying with the *Regulations* by seeking appropriate consultation outside of VDH. For example, installing a system under a waiver could necessitate a more expensive repair system in the future, it might delay a property transfer while a system is upgraded, or it could negatively impact the property's value because a system installed under the waiver may not comport with what the industry's current body of knowledge and experience.

It is the owner's responsibility to determine whether he is best served with a repair system in accordance with § 32.1-164.1:1.B and this policy. The owner should consult with experts in the private sector to determine whether he would prefer a system that anticipates the subsequent inclusion of SE and/or pressure-dosing components or a system designed by VDH that usually will not include those considerations (as stated before, VDH does not have the resources to extensively consult with the owner on the hundreds of design options currently available in the marketplace). For these reasons it is imperative that owners be made aware of the importance of seeking advice from competent private design professionals, even if VDH staff is designing his system pursuant to the waiver provided by the law.

This policy shall not be construed as imposing any obligation on VDH to provide consulting services, to minimize or maximize an owner's financial liability, or to guarantee that any system designed and permitted by VDH will function for any specified period of time. All stakeholders must understand that any system designed with a waiver under § 32.1-164.1:1.B does not comply with the *Regulations* for new construction nor does it meet the industry's current expectations for system designs.

IV. Procedures.

The responsible Environmental Health Specialist Senior (EHSS) will determine whether an owner qualifies for a waiver under § 32.1-164.1:1.B as part of the routine processing of a repair application. Attachment #4 is a flowchart for determining whether an owner qualifies for a waiver from SE, PD, or both. The shaded boxes indicate decision paths where owners may request VDH staff to design the repair system.

Attachment #1 is a letter notifying the owner of the requirement(s) for SE and/or PD and that the waiver is available. This suggested letter should be applicable to the majority of cases that local health departments will see. **In these cases the owner may elect to ask VDH to design a system under the Waiver because the system does not require SE or PD.** The owner may also choose to hire an AOSE/PE to prepare plans and specifications for the repair system. Attachment #2 is similar to Attachment #1 and contains suggested language for notifying an owner that he is eligible for only one of the waivers (SE or PD) or that he is not eligible for any waiver. Attachment #2 will require substantial modification to tailor it to a specific situation and it should not be used as a “form letter.”

Prior to sending a letter by certified mail notifying an owner that he is eligible for a waiver, the EHSS must determine whether the failing system was installed illegally without a permit. If the EHSS finds substantial evidence that the system was installed illegally without a permit, then he should immediately inform the appropriate VDH supervisory personnel to initiate enforcement proceedings. The letters in Attachments #1 and #2 do not apply to any system that was installed illegally without a permit.

The responsible EHSS is expected to make reasonable efforts to educate owners about the public health and environmental benefits of secondary treatment and/or pressure dosing, and also the benefits of going to the private sector for design and financial consultation. Such reasonable efforts to inform the owner must not, however, unnecessarily delay him from obtaining a permit to construct a repair. VDH staff shall not advise owners about whether to request a waiver; but instead, staff should encourage owners to seek advice from private advisors such as attorneys, designers, or real estate professionals.

An owner wishing to receive a waiver must return the properly executed waiver request and agreement found in Attachment #3. When properly executed by the owner, Attachment #3 constitutes the request for waiver, the owner's agreement to release VDH and the Commonwealth of liabilities associated with the waiver, and the waiver itself. If an owner is asking VDH staff to design a repair system under a waiver, that waiver must be properly executed and in the hands of the responsible EHSS before a construction permit is released. The process for issuing a construction permit with a waiver is the same as issuing a conditional permit under § 250.J of the *Regulations*. When the owner produces written proof (certification) that he has recorded the waiver in the land records, the construction permit is released and it becomes effective one day later.

Responsibility and authority for implementing § 32.1-164.1:1.B is hereby delegated to the district health directors.

III. Terms.

Pressure Dosing- means any system under the *Regulations* that requires a pump to pressurize a dosing system or device. Examples include drip dispersal, drip irrigation, manifold systems, mound systems, and low pressure distribution systems, etc. The definition does not

include gravity systems, systems that pump effluent to a higher elevation (distribution box with or without enhanced flow), or systems that require a pump because the ground surface over the soil absorption area is higher than the elevation of the lowest fixture in the house.

Treatment beyond the level of treatment provided by the existing system when operating properly- The *Regulations* require an owner to provide secondary treatment for the repair of a failing system if the repair or replacement system does not “substantially comply” with the requirements of the *Regulations* for a system with STE. The most common application of this term is expected to occur when an owner of a individual single-family home needs a repair permit that involves replacing all or part of the soil absorption system, the existing system is a STE system, and the site and soil conditions do not substantially comply with the *Regulations* for a STE system. In such cases the owner is required to provide secondary treatment (SE) as part of the design of the repair system.

For the purposes of implementing House Bill 930 any system installed under any regulation other than the *Regulations* is deemed to have had a requirement for STE, unless treatment beyond STE was specifically required at the time the system was originally permitted. Examples of such specific additional treatment requirements include, but are not limited to variances, terms of settlement of appeals or orders of the Appeal Review Board, Orders of the Board of Health (includes consent orders), mass drainfields, designs by a PE or by an AOSE/PE, and proprietary pre-engineered systems approved by VDH (listed in GMPs).

System “installed illegally without a permit”- means that there is substantial evidence that an owner (either the current one or a previous one) installed an onsite sewage system intentionally without a permit at a time when there was a requirement to obtain a permit prior to installing an onsite sewage system. The mere lack of permit documentation in VDH files is not substantial evidence that a system was installed illegally without a permit. There must be additional evidence that supports a conclusion that a person knew a permit was required and intentionally installed a system without one. In other cases VDH has relied upon evidence such as a prior permit denial for the same property, a building permit issued for a different type of structure (i.e. building permit issued for a barn or shed, but instead a home was built), and records of other local government offices. Please contact the Division of Onsite Sewage and Water Services if there are questions about a specific case.

List of Attachments:

1. Attachment #1: Letter to Applicant, SE with or without PD Dosing Required
2. Attachment #2: Suggested letter to be modified by VDH staff as appropriate
3. Attachment #3: Request for Waiver/Release and Hold Harmless Agreement/Waiver
4. Attachment #4: Flow chart for determining when the waiver applies.